UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROAD SPRINKLER FITTERS, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, LOCAL 669

Case No. 21-CE-374

and

COSCO FIRE PROTECTION, INC.

and

NATIONAL FIRE SPRINKLER ASSOCIATION, INC.

Party in Interest

and

FIRETROL PROTECTION SYSTEMS, INC.

Party in Interest

CHARGING PARTY'S EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE WILLIAM G. KOCOL

	Exception	Page : Lines	Record	Grounds
1.	To the ALJ's statement that the General Counsel conceded that the first portion of Addendum C to the collective bargaining agreement is a lawful work preservation provision.	p. 2 : 39-40	Entire transcript.	No such concession was made by the General Counsel.

2.	To the ALJ's statement that "the foregoing portion is admittedly lawful."	p. 3 : 23	Entire transcript.	The Record does not contain such an admission.
3.	To the ALJ's conclusion that the language of the second part of Addendum C "is designed [to] apply to business entities that perform unit work".	p. 5 : 11-12	GC Ex. 5, Addendum C.	Incorrect legal conclusion.
4.	To the ALJ's statement that the language of Addendum C is almost identical to language in Painters District Council 51 (Manganaro Corp.) 321 NLRB 158 that the Board found was directed at unit work.	p. 5 : 12-14	GC Ex. 5, Addendum C.	Incorrect legal conclusion.
5.	To the ALJ's conclusion that "It follows that the agreement has a work preservation objective."	p. 5 : 14-15	GC Ex. 5, Addendum C.	Incorrect legal conclusion.
6.	To the ALJ's finding that "the agreement on its face applies only when a signatory employer establishes or maintains operations that perform unit work" and that "on its face this language clearly can be read to satisfy the 'right to control' test."	p. 5 : 15-17	GC Ex. 5, Addendum C.	Incorrect legal conclusion.
7.	To the ALJ's inaccurate categorization of the Charging Party's argument to imply that in order to find a violation of Section 8(e) of the Act under the Charging Party's argument, evidence would have to be presented that the signatory employer established another entity but then relinquished control of unit work. The ALJ then holds that such evidence is	p. 5 : 19-29	Charging Party's Brief to the ALJ; passim.	Incorrect analysis and conclusion.

	Exception	Page : Lines	Record	Grounds
	not permitted in assessing the facial validity of a clause.			
8.	To the ALJ's out-of-context quotation of a sentence in the Charging Party's Brief, and his statement that the General Counsel makes a similar argument, in order to set up and then decline to resolve an argument that was neither made by the Charging Party nor the General Counsel.	p. 5 : 31-40	Charging Party's Brief to ALJ, p. 2; GC Brief to ALJ, p. 9.	Neither Charging Party nor General Counsel requested the ALJ to make a finding on this theoretical argument.
9.	To the ALJ's over-simplification of the General Counsel's argument and his finding that the alleged unlawful language of Addendum C "simply reflects an ordering of the grievances to be filed" and his conclusion that "... the agreement is a lawful work preservation agreement."	p. 5 : 42-47	GC Ex. 5, Addendum C.	Incorrect analysis and legal conclusion.
10.	To the ALJ's distinguishing the Alessio Construction case on the ground that the provision at issue herein applies only to unit work.	P. 6 : 1-3	GC Ex. 5, Addendum C.	Incorrect legal conclusion.
11.	To the ALJ's finding that "the aim of the clause is primary in purpose, it does not seek to acquire work of a type not covered by the contract."	P. 6 : 4-5	GC Ex. 5, Addendum C.	Incorrect legal conclusion.
12.	To the ALJ's finding that "the contested provision applies only to entities that are established or maintained by a signatory employer" and that "this language may be read to require the employer to have the right to control the flow of unit work."	P. 6 : 5-7	GC Ex. 5, Addendum C.	Incorrect legal conclusion.

	Exception	Page : Lines	Record	Grounds
13.	To the ALJ's discussion and conclusion that the application of the agreement is limited to circumstances where the Union establishes majority status and that it assures the development of a Section 9(a) relationship.	P. 6 : 9-11	GC Ex. 5, Addendum C.	Incorrect legal conclusion.
14.	To the ALJ's incorrect analysis of the Board's decision in Heartland Industrial Partners, 348 NLRB 1081 and his failure to distinguish that case from the instant case on the ground that herein the signatory employer has no right to control the work of the target company.	P. 6 : 17-24	GC Ex. 5, Addendum C.	Incorrect analysis and legal conclusion.
15.	To the ALJ's finding that the agreement applies only to employers established or maintained by the signatory employer and, therefore, does not have a cease doing business object.	P. 6 : 19-24	GC Ex. 5, Addendum C.	Incorrect legal conclusion.
16.	To the ALJ's finding that it is unnecessary to decide whether the agreement would be lawful under the construction industry proviso to Section 8(e).	P. 6 : 26 -28	GC Ex. 5, Addendum C.	Incorrect legal conclusion.
17.	To the ALJ's dismissal of the Complaint.	P. 6 : 34	Entire record.	Incorrect legal conclusion.
18.	To the ALJ's failure to analyze or discuss the main arguments advanced by the General Counsel and the Charging Party in their respective briefs.		General Counsel's Brief to ALJ; Charging Party's Brief to ALJ.	Incorrect legal analysis and conclusion.
19.	To the ALJ's apparent conclusion that the	Passim.		Incorrect legal conclusion.

Exception	Page : Lines	Record	Grounds
"established or maintained" language of the disputed provision establishes the right to control unit work, a conclusion that is contrary to established Board law.			
20. To the ALJ's failure to distinguish the first part of Addendum C which contains a requirement that the signatory employer must exercise management or control over the target entity, from the second part of Addendum C which contains no such requirement and is, therefore, unlawful on that ground.	Passim.		
21. To the ALJ's failure to consider or analyze the alleged unlawful effect of the language of the second part of Addendum C which establishes the procedure to be followed if the Union files, or in the past has filed, a grievance under Article 3, and the grievance was not sustained.	Passim.		

Dated: December 22, 2008

Respectfully submitted,

Alan R. Berkowitz
Bingham McCutchen LLP
Counsel for Charging Party COSCO FIRE PROTECTION, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2008, I caused copies of the **CHARGING PARTY'S EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE WILLIAM G. KOCOL** to be served on the following parties by mail:

James F. Small
Regional Director, Region 21
National Labor Relations Board
888 South Figueroa Street, 9th Floor
Los Angeles, CA 90017-5449

Cecelia Valentine
Counsel for the General Counsel
National Labor Relations Board, Region 21
888 South Figueroa Street, 9th Floor
Los Angeles, CA 90017-5449

William W. Osborne, Jr.
Osborne Law Offices
4301 Connecticut Avenue N.W., Suite 108
Washington, D.C. 20008

John Viniello, President
Alexander Gettler, Vice President of Industrial Relations & Director of Human Resources
James F. Lynch, Assistant Vice President of Industrial Relations & General Counsel
National Fire Sprinkler Association
40 Jon Barrett Road
Patterson, NY 12563

Firetrol Protection Systems, Inc.
Michael Westover
Director of Human Resources
400 Garden Oaks Boulevard
Houston, TX 77018

Laurence S. Zakson
Attorney at Law
Reich, Adell & Cvitan
3550 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90010-2314

Dated at San Francisco, California, this 22nd day of December, 2008.

Anna Lee

Anna Lee

A 72787136 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROAD SPRINKLER FITTERS, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, LOCAL 669

Case No. 21-CE-374

and

COSCO FIRE PROTECTION, INC.

and

NATIONAL FIRE SPRINKLER ASSOCIATION, INC.

Party in Interest

and

FIRETROL PROTECTION SYSTEMS, INC.

Party in Interest

CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION AND PREVIEW OF ARGUMENT

The issue in this case is whether Addendum C to the nationwide multi-employer collective bargaining agreement between Respondent Road Sprinkler Fitters, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local 669 ("Union") and the National Fire Sprinkler Association ("NFSA") is unlawful under Section 8(e) of the National Labor Relations Act. Addendum C is

an "anti-double-breasting" provision which was amended during the negotiations for a new contract in 2007. The newly amended "anti-double-breasting" provision is alleged to be unlawful on its face.

Although extensive briefs were filed by all parties in this case, the Administrative Law Judge failed to address the main issues argued by the General Counsel and the Charging Party. In sum, the ALJ concluded that Addendum C has a lawful work preservation object. But, he reaches that conclusion without considering the novel issues raised by the new language to Addendum C. Rather, the ALJ ignores them. Moreover, his decision rests on premises previously rejected by the Board. In the end, the ALJ's decision is contrary to existing law and must be reversed.

The "anti-double-breasting" provision was previously contained in Article 3 of the collective bargaining agreement but was amended and moved to Addendum C in the present contract. The newly added language of Addendum C provides that "in the event that the Union files, or in the past has filed, a grievance under Article 3 of this or a prior national agreement, **and the grievance was not sustained**"[emphasis added] the Union may insist on a procedure which would require an employer signatory to the contract to force its "related" company to agree to a card check recognition procedure, and to adopt the existing contract if the Union establishes majority status. This requirement is facially unlawful under Section 8(e) for several reasons.

First, it is designed to apply only after the Union has unsuccessfully pursued a grievance against the signatory employer under the old Article 3. Addendum C gives the Union a second bite at the proverbial apple. A grievance under Article 3 would decide whether " the Employer ... perform[ed] any work of the type covered by this agreement as a single or joint Employer ...

wherein the Employer ... exercised either directly or indirectly .. controlling or majority ownership, management or control over such entity..." (GC Ex. 3, Article 3) Thus, a prior adverse decision under Article 3 is necessarily a finding that the signatory employer is not a single or joint employer and has no management or control over its related entity. Despite this fatal predicate the new language of Addendum C requires the signatory to do what it has no power to do - -force its corporate sister to agree to the procedures set forth in the Addendum. Absent voluntary agreement by the sister company to be bound by the procedures mandated by Addendum C, the only viable alternative is for the signatory employer to break off its corporate relationship with its sister company. The Board views this as an unlawful "cease doing business" object.

Although the new language of Addendum C is triggered only after the Union loses a prior Article 3 grievance, Addendum C contains no requirement that the Union prove changed circumstances before it can implement the new post-grievance procedures. In the absence of changed circumstances, the clause on its face applies to a company previously found not to be a joint or single employer with, or have the right to control the work of its corporate sibling. The prior grievance having determined that the two entities are separate and independent entities, the clause cannot have a work preservation object because the Union can have no claim to work that the signatory employer has no right to perform!

The new language is also unlawful for another and equally compelling reason. The new post-grievance language does not require that the signatory employer control or manage the related company. An "anti-double-breasting" provision must contain language limiting its application to situations where the signatory employer manages or controls the related entity. A statement in the anti-double-breasting provision that the clause applies if the signatory employer

merely "establishes or maintains" a related entity is not enough to make it lawful. The clause must require the signatory employer to control or manage its affiliate (i.e. meet the right to control test) in order to be considered a primary work preservation clause rather than a secondary work acquisition clause. The ALJ's finding to the contrary is wrong.

As discussed more fully below, Addendum C is unlawful on it face.

II. FACTS

A. The Context Of This Dispute.

The Charging Party, Cosco Fire Protection, Inc. ("Cosco") is, and for many years has been, a member of the National Fire Sprinkler Association, a multi-employer bargaining association. (Tr. 24). It was signatory to the 2000 - 2005 collective bargaining agreement between the NFSA and the Union. (GC Ex. 3). Cosco is a wholly owned subsidiary of Consolidated Fire Protection, LLC ("CFP"). Firetrol Fire Protection Systems, Inc. ("Firetrol") is also a subsidiary of CFP and a sister company to Cosco. Firetrol has always operated as a non-union company. (Tr. 50, 52, 55).

On or about September 9, 2004, the Union filed a grievance against Cosco under Article 3 of the 2000 -2005 contract. Between June 20 and June 23, 2005 Arbitrator Ira Jaffe conducted an arbitration hearing concerning the grievance during which he heard testimony and received evidence from Cosco and the Union. On or about April 6, 2006 Arbitrator Jaffe issued his Arbitration Award, denying the grievance and concluding that "there was no showing, based on the totality of the record evidence, that Firetrol and Cosco were a single employer or were joint employers..." notwithstanding that they are commonly owned by Consolidated Fire Protection, LLC. (GC Exs. 2 and 4; Tr. 21).

The Arbitrator specifically found:

> The facts in this case . . . show: 1) separate work forces, no employee interchange, and no common supervision; 2) no geographic overlap of business and no competition or common bidding; 3) no interchange of equipment or supplies; and 4) no showing that any bargaining unit work was lost as a result of the creation of the nonunion affiliates, which operated in different markets...

The Arbitrator concluded that "the record evidence falls short of establishing under applicable NLRB and judicial principles, that Cosco and Firetrol are a single employer." (*See* GC Ex. 4, p. 92). In sum, the Arbitrator's decision vindicated Cosco's position that Cosco and Firetrol were separate, independent entities and that Cosco had no ability to control the labor relations of Firetrol. The grievance was dismissed.

Shortly after Arbitrator Jaffe issued his decision the Union and NFSA commenced negotiations for a new collective bargaining agreement. (Tr. 36) One of the issues of great importance to the Union was Article 3 (Tr. 35) As the Cosco arbitration was the only Article 3 grievance lost by the Union, and in the circumstances described herein, it is reasonable to conclude that the negotiations that followed were a direct consequence of that loss. (Tr. 31) Thus, Article 3 had remained substantively unchanged since at least 1985. (*See* CP Exs. 1 and 2) Now, for the first time Article 3 was amended to include a provision mandating a procedure to be followed if the Union files and loses a grievance under Article 3. (GC Ex. 5) It takes little insight to see that the new language of what is now Addendum C was directed to Cosco.

B. The Old And New Contract Provisions.

As a result of the multi-employer negotiations for the 2007-2010 Master Contract, the Union and NFSA revised the long existing language of Article 3 of the prior collective bargaining agreements (see CP Exs. 1 and 2). They further took Article 3 out of the body of the contract and attached it as Addendum C to the new agreement. (Tr. 38; GC Ex. 5).

Addendum C to the 2007 -2010 reads as follows (bold text represents additions to prior Article 3):

PRESERVATION OF BARGAINING UNIT WORK

In order to protect and preserve for the employees covered by this Agreement all work historically and traditionally performed by them, and in order to prevent any device or subterfuge to avoid the protection or preservation of such work, it is hereby as follows: If and when the Employer shall perform any work of the type covered by this Agreement as a single or joint Employer (which shall be interpreted pursuant to applicable NLRB and judicial principles) within the trade and territorial jurisdiction of Local 669, under its own name or under the name of another, as a corporation, sole proprietorship, partnership, or any other business entity including a joint venture, wherein the Employer (including its officers, directors, owners partners or stockholders) exercised either directly or indirectly (such as through family members) controlling or majority ownership, management or control over such other entity, the wage and fringe benefit terms and conditions of this Agreement shall be applicable to all such work performed on or after the effective date of this Agreement. The question of single Employer status shall be determined under applicable NLRB and judicial principles, i.e., whether there exists between the two companies an arm's length relationship as found among unintegrated companies and/or whether overall control over critical matters exists at the policy level. **The parties hereby incorporate the standard adopted by the Court in Operating Engineers Local 627 v. NLRB, 518 F.2d 1040 (D.C. Cir. 1975), and affirmed by the Supreme Court, 425 U.S. 800 (1976), as controlling.** A joint Employer, under NLRB and judicial principles, is two independent legal entities that share, codetermine, or meaningfully affect labor relations matters.

Should the Employer establish or maintain such other entity within the meaning of the preceding paragraph, the Employer is under an affirmative obligation to notify the Union of the existence and nature of and work performed by such entity and the nature and extent of its relationship to the signatory Employer. The supplying of false, misleading, or incomplete information (in response to a request by the Union) shall not constitute compliance with this section. The Union shall not unreasonably delay the filing of a grievance under this Article. **In the event that the Union files, or in the past has filed, a grievance under Article 3 of this or a prior national agreement, and the grievance was not sustained,**

the Union may proceed under the following procedures with respect to the contractor(s) involved in the grievance:

Should the Employer establish or maintain operations that are not signatory to this Agreement, under its own name or another, or through another related business entity, to perform work of the type covered by this Agreement within the Union's territorial jurisdiction, the terms and conditions of this Agreement shall become applicable to and binding upon such operations at such time as a majority of employees of the entity (as determined on a state-by-state, regional or facility-by-facility, basis consistent with NLRB unit determination standards) designate the Union as their exclusive bargaining representative on the basis of their uncoerced execution of authorization cards, pursuant to applicable NLRB standards or, in the event of a good faith dispute over the validity of the authorization cards, pursuant to a secret ballot election under the supervision of a private independent third party to be designated by the Union and the NFSA within thirty (30) days of ratification of this Agreement. The Employer and the Union agree not to coerce employees or to otherwise interfere with employees in their decision whether or not to sign an authorization card and/or to vote in a third party election.

Particular disputes arising under the foregoing paragraphs shall be heard by one of four persons to be selected by the parties (alternatively depending upon their availability) as a Special Arbitrator. The Arbitrator shall have the authority to order the Employer to provide appropriate and relevant information in compliance with this clause. **The Special Arbitrator shall have authority to confirm that the Union has obtained an authorization card majority as provided in the preceding paragraph.**

Because the practice of double-breasting is a source of strife in the sprinkler industry that endangers mutual efforts to expand market share for union members and union employers, it is the intention of the parties hereto that **the provisions of this Article shall** be enforced to the fullest extent permissible by law.

Except as specifically provided above, it is not intended that this Article be the exclusive source of rights or remedies that the parties may have under State or Federal Laws.

III. ARGUMENT

A. The Parameters Of Section 8(e).

Section 8(e) of the Act prohibits unions and employers from entering into an agreement in which an employer agrees to refrain from or to cease doing business with another person. As interpreted by the U.S. Supreme Court in *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967) Section 8(e) applies only to agreements that have a secondary, as opposed to a primary, work preservation objective. In the context of "anti-double-breasting" clauses which attempt to prohibit an employer signatory to a collective bargaining agreement from owning or otherwise controlling another business entity that is non-union, the Board has consistently held that, to be lawful, an "anti-double-breasting" clause must on its face be limited to situations in which the signatory employer manages or controls the related entity that the clause seeks to affect. *See Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023 (1993). As the Supreme Court held in *NLRB v. Longshoremen ILA*, 447 U.S. 490 at 506 (1980), "if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have power over the work."

The new language of Addendum C is unlawful under 8(e) of the Act because it is triggered only after there has been a finding in a prior grievance that the signatory employer is not a single or joint employer with, or have the right to control, its related entity. Further, the new language of Addendum C fails to contain the required "right of control" language and, therefore, on its face is based on common ownership alone. Under controlling Board and Court precedent, Addendum C must be found to be unlawful under Section 8(e) of the Act.

B. ALJ Erroneously Concluded That The Language Of Addendum C Is Designed To Apply To Entities That Perform Unit Work.

The Administrative Law Judge begins his analysis on a faulty premise. He initially finds that the new language of Addendum C only applies to entities that perform unit work simply because it states that it applies to entities that "perform work of type covered by this agreement." (ALJD p. 5 : 11-15) Although the ALJ correctly notes that this language is similar to the language in *Painters District Council 51 (Manganaro Corp.)*, 321 NLRB 158 (1996), he fails to recognize that the Board did not end its analysis there. In *Manganaro*, the Board addressed the Supreme Court's admonition that "whether the agreement is a lawful work preservation agreement depends on 'whether under all the circumstances, the Union's objective was preservation of work for [bargaining unit] employees, or whether the [agreement was] tactically calculated to satisfy union objectives elsewhere . . .'" *NLRB v. Longshoremen ILA*, (ILA I) 447 U.S. 490, at 504, citing *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 at 644-645. The Board then analyzed the clause in question in *Manganaro* under the two part test established by the Supreme Court in ILA I. First, the agreement must have as its objective the preservation of work traditionally performed by Union represented employees. Second, and most important here, the signatory employer must have the power to give the employees the work in question. ". . [I]f the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective . . ." ILA I, *supra* at 506.

In *Manganaro*, the Board specifically found that the requirement in the anti-double-breasting clause that the signatory contractor exercise "management, control or majority ownership over another entity presumptively means the contractor has the right or power to control the assignment of work of that entity's employees." *Manganaro, supra* at 164. Importantly, the Board noted that the provision applies only if the signatory "exercises" such

control. *Manganaro*, *supra* at 164; *see also Dist. Council No. 16, Painters & Allied Trades (B&B Glass, Inc.)*, 510 F.3d 851 (9th Cir. 2007) at 855.

This is consistent with the Board's earlier decision in *Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023 which held that common ownership alone could not support an "anti-double-breasting" clause. Indeed, in *Alessio*, the Board found the anti-double-breasting clause therein violated Section 8(e) because it did not require that the signatory employer control or manage the affiliates covered by the provision and thus ". . . would reach companies performing work that was not within the signatory's 'right of control' but, rather, had been independently obtained from clients that had never intended to give their business to *Alessio*." *Alessio Construction*, *supra* at 1026.

Contrary to the specific holdings of the Board in *Alessio*, the ALJ in this case found the new language of Addendum C to be lawful even though it contains no language restricting its application to entities over which the signatory has management or control. (ALJD p. 5: 15-19) The ALJ incorrectly concluded that as the clause applies only when a signatory employer "establishes or maintains" a related entity, the "right to control" test is satisfied. This holding is directly contrary to the dictates of the U.S. Supreme Court, the Board and the requirements of the contract itself.

C. Addendum C Is Facially Unlawful Because It Purports To Regulate The Labor Relations Of Entities Previously Determined To Be Separate And Independent From The Signatory Employer.

Employers are legally entitled to "set up a related company in such a way that it is neither an alter ego nor a single employer with the first company." *See SC Pacific*, 312 NLRB 903, 904 at n. 3 (1993). While unions typically abhor such double-breasted arrangements, "[d]epending on how the companies are structured and operated, each may be a separate corporation or else

both may be so interrelated that they constitute a single employer or alter ego of the other. **A collective-bargaining contract signed by one of the companies would not bind the other if each were a separate corporation**." *See Walter N. Yoder & Sons*, 270 NLRB 652, 656 n. 6 (1984) [emphasis added].

The illegality of the post-grievance procedures required by Addendum C stems from the fact that they are triggered "[i]n the event that the Union files, or in the past has filed, a grievance under Article 3 . . . and the grievance was not sustained . . ." In other words, in the context of this case the card-check and contract application requirements of Addendum C must be imposed by Cosco (the signatory employer) on Firetrol (its related company) notwithstanding a previous determination by an arbitrator that Cosco does not manage or control the work of Firetrol! Logic would dictate that once an arbitrator determines that the two companies are separate and independent there can be no further claim by the Union to any right to influence the labor relations or employment policies of Firetrol. Yet Addendum C does just the opposite. Addendum C requires that notwithstanding a prior determination that the signatory employer (Cosco) has no right to control its sister company (Firetrol), the signatory company is contractually bound to guarantee that its sister company agree to neutrality in the face of union organizing, a card check in lieu of a secret ballot election and the adoption of the terms and conditions of an existing contract rather than negotiating a contract on its own. Addendum C is facially unlawful because by its terms it attempts to regulate the labor relations of a company which has already been found to be separate and independent from the signatory employer.

In these circumstances the signatory employer is put into an untenable position. It must either violate the contract because it has no power to require its affiliate to comply with the contractual provisions or it must terminate its corporate relationship with the affiliate. This

result violates Section 8(e) because it requires Cosco to "cease doing business with another person, namely the Employer's own subsidiaries or joint ventures," or in this case, its sister company -- Firetrol. *See Novinger's, Inc.*, 337 NLRB 1030 at 1037 (2002) (holding contract clause illegal under 8(e) because it is "not solely addressed to the labor relations of the contracting Employer vis a vis his own employees.").

The facial illegality of Addendum C is made clear by the context of this case. Arbitrator Jaffe determined that Cosco and Firetrol are separate, independent companies whose only relation is common ownership by CFP LLC. On its face, Addendum C nevertheless mandates that Cosco require Firetrol to agree to the card check recognition and the related procedures of Addendum C notwithstanding that Cosco has no right to control Firetrol. Therein lies the vice.[1]

Addendum C is a facially unlawful 8(e) agreement because it flies in the face of an arbitrator's prior determination that the entities in question are not single employers under Board principles. It must be remembered that the issue that would be decided under a prior Article 3 grievance is whether a signatory employer manages or controls a related company such that they are considered a single employer under established Board and judicial principles. An adverse decision on this issue necessarily precludes the Union from making any claim against the signatory with respect to its related entity absent a showing of changed circumstances. Yet, this is precisely what Addendum C seeks to accomplish. For this reason, Addendum C is facially, and fatally flawed under Section 8(e) of the Act.

---

[1] The unlawful purpose of Addendum C is illustrated by the fact that it leaves absolutely no room for lawfully double breasted operations. For example, if a union company establishes a non-union subsidiary and does not maintain its separate status, Addendum C requires that the terms and conditions of the Master Contract apply to the non-union entity. But, *if* a union company establishes a non-union entity that does maintain its separate status, Addendum C *still* attempts to control the non-signatory's labor relations by imposing card check recognition and contract application upon a showing of majority support. Such wholesale restrictions on double-breasted operations are unlawful. *See SC Pacific*, 312 NLRB at 904 (holding blanket prohibitions on "double-breasting altogether" violates Section 8(e) of the Act.).

Moreover, in *Manganaro*, the Board found "illustrative of the Union's primary objective the fact that the clause is not a union signatory clause that seeks to organize the employees of the nonunion entity." Slip Op. p. 166. This is in stark contrast with the new language of Addendum C in the present case which specifically is designed to allow the Union to more easily organize the affiliate's employees through card check recognition and the adoption of the existing contract if the Union obtains majority status. The secondary object of the Addendum C can be ascertained from this provision alone. Indeed in justifying the lawfulness of the clause in *Manganaro* the Board went to lengths to point out that "the clause applies only when the signatory contractor performs unit work through a nonunion entity, and even then the clause applies only to the unit work performed. All other work performed by the nonunion entity is left unaffected." Slip Op. p. 166. This is quite different from the requirements that Cosco would be required to impose on Firetrol under the terms of Addendum C. The Addendum C requirements go far beyond work preservation. Indeed the post-grievance requirements have nothing to do with work preservation but rather are focused on Union organization and work acquisition.

D. The ALJ Erred In Finding That The "Establishes or Maintains" Language Of Addendum C Satisfies The Right To Control Test.

The ALJ erroneously concluded that ".. the agreement on its face applies only when a signatory employer establishes or maintains operations that perform unit work. On its face, this language clearly can be read to satisfy the 'right to control' test." ALJD p. 5. The Judge's conclusion is contrary to well-established law. Unlike the old Article 3 which was limited to situations involving "single or joint Employers", the new language added to Addendum C applies whenever a signatory contractor "establishes or maintains" another related business entity. Although the original language of Article 3 contains the "ownership, management or control" language, the new post-grievance provision does not contain any language limiting its

application to situations in which the signatory employer manages or controls the related company. The Board finds clauses such as this unlawful because, "by requiring the extension of the collective bargaining agreement to [non-signatory] affiliates as it defines them, . . . it is calculated to cause [a signatory company] to sever its ownership relationship with affiliated firms that seek to remain nonunion . . . even though those firms are separate employers under court-approved Board law." *See Alessio Construction*, 310 NLRB 1023, 1025 (1993).

Anti-dual shop provisions (often designated as work preservation clauses) are unlawful unless they are narrowly tailored to situations where the signatory employer has the power to give the Union the disputed work. *See Painters and Allied Trades District Council No. 51 (Manganaro Corporation)*, 321 NLRB 158 at 164 (1996). "[I]f the contracting employer [Cosco] has no power to assign [Firetrol's] work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work." *See NLRB v. Longshoreman ILA*, 447 US at 504-506. For this reason, the Board strikes down contract provisions requiring application of a an agreement whenever mere "partners, stock holders, or beneficial owners of the [signatory] company form or participate in the formation of another company." *See Alessio Construction Co.*, 310 NLRB at 1023. The new language in Addendum C applies when the signatory employer establishes or maintains a ***related business entity*** which performs work of the type covered under the contract. *See* Addendum C, p. 2. But, the language is not restricted to situations in which the signatory employer manages or controls the related entity.

It is interesting to note that the language approved by the board in *Manganaro* is nearly identical to the language in the Article 3 before it was changed. The new language of Addendum C suffers from the same deficiency as the language found unlawful in *Alessio*.

Without language limiting application of anti-dual-shop clauses to situations in which the signatory owns, manages or controls the affiliate company, the Board will find the clause unlawful on its face. For example, in *Southwestern Materials*, 328 NLRB 934, 934 (1999), the Board considered the validity of a contract provision stating that the "agreement shall be effective in all places where work is being performed or is to be performed by the Employer-or any person, firm or corporation owned or financially controlled by the Employer." This provision was found to be unlawful because it was not limited on its face to situations where the signatory has a right of control over the other entity.[2]

Similarly, *Novinger Inc.*, 337 NLRB 1030 (2002), involved a wholly-owned subsidiary of Novinger N.G. (the parent). The parent company also owned a non-union subsidiary, Kelly Systems, Inc. The Union's contract with Novinger, Inc., contained a purported work preservation clause which required, that "any of their subsidiaries or joint venture[s] to which they may be parties . . . shall be covered by the terms of this agreement." The Board found an 8(e) violation because the contract had an unlawful cease doing business object where "on its face is an agreement to cease doing business with another person, namely the Employers' own subsidiaries or joint ventures . . ." The "language of the instant clause is overly broad mainly but not solely because it makes no distinction between joint venture partners of the Employer over whom the Employer may have the so-called right of control of labor policies and those over whom it may not." Addendum C's application to all "related business entities" suffers from the same defect.

---

[2] The facts in Southwestern Materials are remarkably similar to the present situation. In that case, the signatory to an Agreement had recognized the union since 1959. In 1972, a parent company purchased the signatory entity and continued to operate it as a separate subsidiary. In 1974, the parent company purchased a non-union subsidiary doing the *same* work in the *same* area. Finally, in 1986, the Union moved to compel arbitration on the question whether the non-union subsidiary (i.e., a sister-company like Firetrol) should be forced to apply the contract signed by its corporate sister (like Cosco). These facts are squarely on point. The Board found a violation of Section 8(e) because the contract language was not expressly limited to situations where the signatory company controlled the labor relations of the other.

RWKS Comstock, 344 NLRB No. 90 (2005), provides yet another example in which the Board struck down a so-called work preservation clause. Railwork Transit Systems owned two subsidiaries: (i) Railwork Transit, Inc., and (ii) L.K. Comstock. Only Railwork Transit, Inc., had a contract with the Union. The contract provided that "[t]o assure the maintenance of work opportunities, the Employer stipulates that any firm engaging in Heavy Construction Work . . . in which it has or acquires a financial interest or is participating in a venture with other contractors or operators, shall be responsible for compliance with all of the terms and conditions of this Agreement." At some point L.K. Comstock and Railwork Transit, Inc., participated in a joint venture. The Union thereafter filed a grievance against Railwork Transit, Inc., arguing that the contract required them to apply the contract to the joint venture. The Board held the contract provision "unlawful on its face because it does not limit the provision to those situations where there is both common ownership and control or where there is a division of struck work." In the present case, Addendum C is unlawful because it applies to all "related" business entities without regard to the signatory's ability to assign and/or control the target entity's work.

E. The ALJ's Discussion Of Heartland Is Misplaced.

In *Heartland Industrial Partners*, 348 NLRB No. 72 (2006), the Board addressed the legality of a neutrality agreement by which a parent company agreed to require its subsequently purchased subsidiaries to execute a neutrality agreement which included card-check recognition and interest arbitration. In his brief analysis of the *Heartland* decision, the ALJ found that in *Heartland* "..the Board rejected the notion that the recognition requirement of the agreement was tantamount to a cease doing business objective." ALJD p. 6. But that analysis misses the point. What easily distinguishes Heartland from the present case is that the parent company that entered into the contract with the Union clearly had the power and ability to require any subsidiaries it purchased to agree to these conditions. It had the ability to structure its future business

purchases however it deemed fit. The parent company had the right to retain "the power . . . or other means, to direct the management and policies of the enterprise." *See id.* at 72. In sum, it had the right of control and exercised it.

In contrast, in this case the 2007-2010 collective bargaining agreement is between Cosco and the Union. The parent company, CFP LLC, is not a party to the collective bargaining agreement and is not the party subject to the unlawful requirements. What makes the violation in this case, and distinguishes it from Heartland, is the fact that the party to the contract (Cosco), having been found not to have ownership or control over Firetrol, nevertheless is compelled by Addendum C to do what it is unable to do or cease doing business with Firetrol.

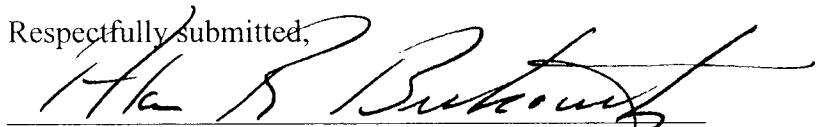
The Board's decision to uphold the neutrality provision in *Heartland* was premised on the notion that the signatory parent company there *could* control the labor relations of its subsidiaries. But, Addendum C herein allows for no such possibility. Indeed, the reverse is true. The neutrality, card-check, and contract adoption requirements of Addendum C are triggered only if the Union has already failed to prove that the signatory controls the labor relations of its affiliate. Therefore, on its face Addendum C purports to influence and control the labor relations of a separate company which it has no right to control. For these reasons, *Heartland* is easily distinguished.

IV. CONCLUSION

For the reasons stated above, Addendum C in the 2007-2010 Master Contract between the Union and Cosco is unlawful under Section 8(e) of the Act.

Dated: December 22, 2008

Respectfully submitted,



Alan R. Berkowitz
Bingham McCutchen LLP
Counsel for Charging Party COSCO FIRE PROTECTION, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2008, I caused copies of the **CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** to be served on the following parties by mail:

James F. Small
Regional Director, Region 21
National Labor Relations Board
888 South Figueroa Street, 9th Floor
Los Angeles, CA 90017-5449

Cecelia Valentine
Counsel for the General Counsel
National Labor Relations Board, Region 21
888 South Figueroa Street, 9th Floor
Los Angeles, CA 90017-5449

William W. Osborne, Jr.
Osborne Law Offices
4301 Connecticut Avenue N.W., Suite 108
Washington, D.C. 20008

John Viniello, President
Alexander Gettler, Vice President of Industrial Relations & Director of Human Resources
James F. Lynch, Assistant Vice President of Industrial Relations & General Counsel
National Fire Sprinkler Association
40 Jon Barrett Road
Patterson, NY 12563

Firetrol Protection Systems, Inc.
Michael Westover
Director of Human Resources
400 Garden Oaks Boulevard
Houston, TX 77018

Laurence S. Zakson
Attorney at Law
Reich, Adell & Cvitan
3550 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90010-2314

Dated at San Francisco, California, this 22nd day of December, 2008.

Anna Lee